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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

THE PEOPLE,

Plaintiff and Respondent,

v.

GARY GENE SPEARS,

Defendant and Appellant.

E046406

(Super.Ct.No. RIF121637)

OPINION

APPEAL from the Superior Court of Riverside County. J. Richard Couzens, Judge. (Retired judge of the Placer Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Neil Auwarter, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

## STATEMENT OF THE CASE

Defendant Gary Gene Spears was charged by a felony complaint with second degree robbery in violation of Penal Code section 211.<sup>1</sup> The complaint further alleged defendant had suffered a prison prior (§ 667.5, subd. (b)), a serious felony prior (§ 667, subd. (a)), and one prior strike within the meaning of the “Three Strikes” law (§§ 667, subds. (c) & (e)(1), 1170.12, subd. (c)(1)).

Pursuant to a written plea agreement, defendant pled guilty to the charged robbery and admitted the priors, in exchange for a sentencing maximum of nine years. The agreement further provided that defendant’s presentence custody credits would be determined at his sentencing hearing. At the initial sentencing hearing, the trial court granted defendant’s *Romero*<sup>2</sup> motion, striking the prior felony strike, and imposed the middle term of three years for the robbery plus five years for the serious felony prior, for a total term of eight years. At a subsequent hearing, the court found that defendant had been reasonably led to believe he would receive seven years under the plea agreement. Accordingly the court modified the sentence to the two-year low term for robbery plus the five-year prior serious felony enhancement, for a total of seven years.

Defendant filed his notice of appeal challenging the sentence and other matters occurring after the plea. He did not request a certificate of probable cause (§ 1237.5).

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise indicated.

<sup>2</sup> *People v. Superior Court (Romero)* 13 Cal.4th 497.

## STATEMENT OF FACTS

Defendant stipulated that the preliminary hearing contained an adequate factual basis for the plea. On July 21, 2005, James Erickson, a detective with the Riverside County Sheriff's Office, interviewed Brenda Estrada, a cashier at Lowe's in Moreno Valley. Estrada stated that on December 12, 2004, defendant went to her register, indicated to her he had a weapon, and demanded the money from the cash register. Estrada gave defendant approximately \$900 and he ran away.

Defendant was arrested on December 16, 2004. State Parole was contacted and a section 3056 hold was issued because defendant was in excess of 50 miles from his listed address without permission from his parole officer. Defendant remained in custody on a parole hold until December 16, 2005. Following his plea and at the time of sentencing, the issue was raised as to defendant's entitlement to custody credit for the 365 days' penalty time that he served for his parole violation. After reviewing the record, the trial court concluded that defendant was not entitled to such credit pursuant to *People v. Bruner* (1995) 9 Cal.4th 1178, 1191.

## DISCUSSION

Defendant has appealed, and at his request we appointed counsel to represent him. Counsel has filed a brief under the authority of *People v. Wende* (1979) 25 Cal.3d 436, and *Anders v. California* (1967) 386 U.S. 738, setting forth a statement of the case, a

statement of facts, potential arguable issues on appeal,<sup>3</sup> and requesting this court to undertake a review of the entire record.

We provided defendant with an opportunity to file a personal supplemental brief, and he has done so. According to defendant, he is entitled to custody credits for his time spent incarcerated from December 16, 2004, to December 16, 2005, because it was attributable to his robbery in the instant matter. In other words, defendant argues that “but for” his commission of the robbery, he would never have been arrested and served the 365 days.

Pursuant to the mandate of *People v. Kelly* (2006) 40 Cal.4th 106, 110, we have completed our independent review of the record and find no arguable issues. Regarding defendant’s contentions, we reject them for the following reasons.

Section 2900.5, subdivision (b) provides that “credit shall be given only where the custody to be credited is attributable to proceedings related to the same conduct for which the defendant has been convicted.” (§ 2900.5, subd. (b).) “[A] prisoner is not entitled to credit for presentence confinement unless he shows that the conduct which led to his conviction was the sole reason for his loss of liberty during the presentence period. Thus . . . his criminal sentence may not be credited with jail or prison time attributable to

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<sup>3</sup> Defendant’s counsel questions (1) whether the trial court’s denial of defendant’s request for custody credits for time served on a parole violation amounts to reversible error under the “dual custody rule,” and (2) whether defendant was properly advised of his constitutional rights and the consequences of pleading guilty, as well as whether he voluntarily waived them.

a parole or probation revocation that was based *only in part* upon the same criminal episode. [Citations.]” (*People v. Bruner, supra*, 9 Cal.4th at 1191.)

Here, the record shows that defendant’s commission of the robbery was not the sole reason for his loss of liberty during the presentence period. Rather, defendant violated a condition of his parole which prohibited him from being more than 50 miles from his listed address without permission from his parole officer. As the summary of revocation hearing and decision (Exhibit A attached to defendant’s supplemental brief) states, defendant was ineligible for credits under section 3057, subdivision (d)(1).

Section 3057, subdivision (d), in relevant part, provides: “Except for parolees specified in paragraph (2), any revocation period imposed under subdivision (a) may be reduced in the same manner and to the same extent as a term of imprisonment may be reduced by worktime credits under Section 2933. . . . [¶] . . . [¶] (2) The following parolees shall not be eligible for credit under this subdivision: [¶] . . . [¶] (B) Parolees who violated a condition of parole relating to . . . entering prohibited areas . . . .” (§ 3057, subds. (d)(1) & (d)(2)(B).)

Although it is true that, had defendant not committed the robbery, he most likely would not have been placed in custody, the causal link between the two is simply too insubstantial to support an award of credits for his custody time between December 16, 2004, and December 16, 2005. Indeed, the *Bruner* court warned against “a strained and hypertechnical reading of section 2900.5, which literally allows credit when the presentence restraint was ‘attributable to *proceedings related* to the same conduct for

which the defendant has been convicted.’ [Citation.]” (*People v. Bruner, supra*, 9 Cal.4th at p. 1191.)

For the above reasons, we reject defendant’s contention.

**DISPOSITION**

The judgment is affirmed.

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HOLLENHORST

J.

We concur:

RAMIREZ

P.J.

MCKINSTER

J.